STATE OF MICHIGAN

COURT OF APPEALS

DAVID PRICE III,

Plaintiff-Appellee,

v

JAMES ALVIN GENTZ and LORI JEAN GENTZ,

Defendants-Appellants,

and

LEON KNOTT, d/b/a ERA GENESEE VALLEY REAL ESTATE,

Defendant.

UNPUBLISHED
July 19, 2005

No. 252772
Genesee Circuit Court
LC No. 01-071706-CZ

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendants Alvin and Lori Gentz (collectively "defendants") appeal as of right from an order denying their motion for summary disposition under MCR 2.116(C)(8) and (10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendants sold their home to plaintiff with a seller's disclosure statement indicating that, to their knowledge, the well and pump were in working order, that there had been no water in the basement, and that there were no flooding, drainage, structural, or grading problems. The purchase agreement stated plaintiff was purchasing the home "as is," except that defendants were "to meet FHA Code" at their own expense. Plaintiff made closing contingent upon a satisfactory inspection. The first inspector found no problems with the home's basement, foundation, or grading. Plaintiff denies receiving the second page of the inspector's report concerning the water supply and sewage disposal evaluation that stated the water supply system was not up to current code. A different company tested the well a second time. The second report concluded that the well was pumping just above the FHA minimum, and, therefore, was acceptable.

On October 20, 2000, the parties closed on the sale. On February 1, 2001, plaintiff's basement flooded. Plaintiff was advised that the pump had been altered to make it work harder and improve water volume and pressure, and that the well jets were plugged.

Plaintiff filed this action alleging fraud and silent fraud against defendants. Defendants moved for summary disposition arguing that because plaintiff had an independent professional inspection of the property, he had waived any claim that he had relied on the sellers' representations. Defendants submitted separate affidavits attesting that the disclosure statement was true and accurate on the date it was signed, and that they had not experienced any flooding, but had always experienced low water pressure. Plaintiff countered with the affidavit of an insurance adjustor attesting that he saw evidence of preexisting water damage on the walls of plaintiff's basement. However, the adjustor could not say whether the basement had flooded before or after defendants purchased the home from the previous owner. Coupled with defendants' statement that they had redecorated and painted the basement, plaintiff alleged this showed defendants had knowledge that the basement had flooded in the past.

Plaintiff also argued that, while the "as is" clause allocated the risk of loss for unknown defects, and for those defects that should have been discovered upon inspection but were not, it did not relieve defendants liability for fraudulent misrepresentations. The trial court agreed.

The trial court also found that the complaint properly stated a claim for fraud and silent fraud, and that there was a question of material fact concerning whether defendants knew that the basement had flooded and fraudulently concealed the water damages by stacking their personal property against the basement walls. Thus, the trial court denied defendants' motion for summary disposition.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In deciding a motion under MCR 2.116(C)(8), "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id*., quoting *Wade v Dept of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Conversely, when reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

III. ANALYSIS

Concerning common-law fraud, plaintiff alleges that by affirmatively stating in the seller's disclosure statement that there were no flooding, grading, or drainage problems, and that the well and pump were in working order, defendants knowingly made false, material representations, intending that he rely upon them, and that he reasonably relied on them to his

detriment. Plaintiff sufficiently stated a claim for common-law fraud. *M&D, Inc v McConkey (On Rehearing)*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Thus, the trial court properly denied defendants' motion for summary disposition under MCR 2.116(C)(8).

Additionally, plaintiff submitted evidence that the well had been altered, and that plaintiffs had stacked their personal belongings against the basement walls during the inspection, allegedly to obscure evidence of prior water damage, later uncovered by an insurance adjuster, Kenneth Betzing. Viewed most favorably to plaintiff, we agree with the trial court that there were questions of material fact concerning whether defendants knew of prior flooding problems and a problem with the well. The trial court properly denied summary disposition of plaintiff's common-law fraud claim under MCR 2.116(C)(10).

Regarding silent fraud, plaintiff alleges that, despite having a duty to disclose defects under the Seller Disclosure Act, MCL 565.951 *et seq.*, defendants failed to disclose problems with the well, and with flooding. The elements of silent fraud are the same as common-law fraud, apart from the nature of the representation. See *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988). The seller's disclosure statement was completed before the parties signed a purchase agreement; thus, the "as is" clause does not preclude defendants' liability for silent fraud as a matter of law. *M&D*, *supra* at 32. Therefore, trial court properly denied defendants' motion for summary disposition under MCR 2.116(C)(8).

We further agree that, as with plaintiff's common-law fraud claim, there were questions of material fact concerning whether the well pump was altered, and whether defendants obscured the basement walls from view to conceal water damage resulting from previous flooding. In this regard, this case is factually distinguishable from the unpublished decisions cited by defendants,[1] and there were questions of material fact concerning whether plaintiff reasonably relied on the representations made by defendants. The trial court properly denied summary disposition of plaintiff's silent fraud claim under MCR 2.116(C)(10).

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello

[1] See *Miner v Teasel*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 1998 (Docket Nos. 197225 & 199165), slip op at 4-5; *Timmons v Franklin*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket Nos. 241507 & 249015), slip op at 4-5. Both decisions held that there was no question of material fact concerning whether the purchaser had relied upon the seller's disclosure statement.